BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF ALEXIS SHIPPING COMPANY, Appellant, vs. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 297 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of a $10,000 civil penalty for allegedly causing or permitting an oil spill having come on regularly for formal hearing on April 21, 1975 in Lacey, Washington, and appellant Alexis Shipping Company appearing through its attorney, Robert H. Madden, and respondent Department of Ecology eppearing through its assistant attorney general, Joseph J. McGoran, and the Board having heard or read the evidence and oral argument, examined the exhibits and stipulations of fact, and having entered on the 2d day of November, 1976 its Second Proposed Findings of Fact, Conclusions of Law and Order, and the Board having

served said Second Proposed Findings, Conclusions and Order upon all parties herein by certified mail, return receipt requested and the time for exceptions to said Second Proposed Order having expired; and

The Board having received appellant's exceptions and respondent's reply thereto to its Second Proposed Findings, Conclusions and Order, and having considered and denied said exceptions, and the Board being fully advised in the premises; now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said Second Proposed Findings of Fact, Conclusions of Law and Order dated the 2d day of November, 1976, and incorporated by reference herein and attached hereto as Exhibit A, are adopted and hereby entered as the Board's Final Findings of Fact, Conclusions of Law and Order herein.

DONE at Lacey, Washington, this 1st day of ~~January,~~ February 1977.

POLLUTION CONTROL HEARINGS BOARD

Art Brown
ART BROWN, Chairman

W A Gissberg
W. A. GISSBERG, Member

Chris Smith
CHRIS SMITH, Chairman

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF ALEXIS SHIPPING COMPANY, Appellant, vs. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 297 SECOND PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A formal hearing on an appeal to review a $20,000 civil penalty assessed upon Appellant for allegedly causing or permitting an oil spill was held before Board members, W. A. Gissberg (presiding officer) and Walt Woodward on June 10 and 11, 1974 in Lacey, Washington.

At the first hearing, Appellant was represented by Robert H. Madden; Respondent was represented by Charles W. Lean. After remand in accordance with our first proposed order, by agreement of both parties and after the resetting of the civil penalty by Respondent to $10,000, a second hearing was held before Board members W. A. Gissberg (presiding)

EXHIBIT A

and Walt Woodward on April 21, 1975 for the limited purpose of taking testimony on the amount of penalty imposed upon Appellant by Respondent and the factors considered by Respondent in arriving at such penalty. At the second hearing, Appellant was represented by Robert H. Madden; Respondent was represented by Joseph J. McGoran.

The present Board members, including Art Brown, Chairman, W. A. Gissberg, and Chris Smith, have each either heard or read the evidence and have considered the record.

Having heard or read the evidence and oral argument, and seen the exhibits and stipulations of fact, and being fully advised, the Board makes the following

FINDINGS OF FACT

I.

The Stipulation of Facts and the Stipulation of Issues agreed to by the parties are adopted in these Findings of Fact and incorporated herein by reference.

II.

Appellant, owner of the vessel, WORLD BOND, used a 14" to 8" reducer, which could not be readily removed, on cargo line #1. The preponderance of the evidence shows that the 14" to 8" reducer performed a reasonable function of protecting the more sensitive and critical gate valve to which it was attached. In the ordinary course of operation on this and similar ships, such a reducer normally would not be removed. In this instance, the long continuing satisfactory use of the attached 14" to 8" reducer gave Appellant no basis to suspect that such equipment configuration might not be adequate for continued

satisfactory operation. Having become assimilated to and essentially a part of the gate valve, the maintenance of such part would not normally include periodic removal.

III.

The testimony and exhibits show by a preponderance of the evidence that the hidden dangers in the shore facilities, including the Chiksan arm and its supporting jack, were not readily apparent to one situated in Appellant's position under the circumstances then and there existing. The technique of transferring oil from a tanker to the shore through modern facilities under the control of the Atlantic Richfield Company (ARCO) who was the shore facility operator, created a deceptive image to WORLD BOND personnel of an apparent adequacy of the shore facilities equipment to compensate for the forces exerted on the 8" flange which ultimately failed. The operation of the arm, which was self-supporting when empty, was misleading as to its actual weight and weight distribution when filled with oil. The shore personnel, who had knowledge of or who were in the best position to know the capabilities of their equipment, had inspected and approved the system, including the 8" flange connection, prior to operation.

IV.

The preponderance of the evidence and stipulations show that the Appellant failed to require the shore facility to make the necessary hose connections as agreed under its contract. Having failed to insist upon such performance by ARCO, Appellant undertook to do the task itself. This task was not a regular duty of the crew of the WORLD BOND or other tankers. The crew of the WORLD BOND was not familiar with the

operation of the Chiksan arm and did not request information on its operation. The crew also failed to inquire whether the reducers and jack were sufficient to support the forces from the Chiksan arm and the reducers. Although the actual work done by the crew was seemingly only mechanical, Appellant's involvement, which included the supply of an 8" to 10" reducer, became significant in relation to the entire oil transfer process. The crew made the actual connection and bolting of the flanges of the reducers. The crew physically maneuvered the Chiksan arm into position for final connection, with help from shore facility employees. The connections were inspected and approved by the shore facility.

At 4:00 a.m. on June 4, 1972, the ship began pumping oil to the shore facility. The pumps ran below full working speed in order to allow them to warm up and provide the crew an opportunity to check all fittings for leaks.

At approximately 5:00 a.m., while pumping continued at less than full speed, the Chiksan arm and three reducers fell to the deck without warning. The line fractured just inboard of the 8" flange of the permanent 14" to 8" reducer affixed to the gate valve.

V.

The evidence presented shows that the fracture on the 14" to 8" reducer was caused by a bending moment created by the weight of the oil in the Chiksan arm and in the connected reducers. A jack designed, fabricated and supplied by ARCO, had been placed by ARCO under the Chiksan arm to partially support the weight of the oil and equipment. The jack collapsed because of either a defective design or defective

weld. A defective weld would have become apparent to a participant if he had carefully examined the jack. The support requirement for the connection of ARCO's largest diameter Chiksan arm to the ship's smallest orifice became a matter of great importance under operating conditions. When the system was filled with oil, the jack support, which was weakened by the vibration caused by the throbbing of the oil pump, collapsed under the weight. The loss of this support, even though relatively small, was multiplied by the length of the Chiksan arm and reducers. The total effect was to exceed the ultimate tensile strength of the 8" flange of the 14" to 8" reducer, which resulted in fracture. Upon fracture, the array of equipment collapsed allowing oil to escape through both the Chiksan arm and the ship's oil line connection. Oil flowed from the broken oil line onto and over the port side and into the water. At the same time, oil back-flowed from the Chiksan arm across to, and over the starboard side and onto the water. Oil cascading over the starboard side escaped the encircling boom which, because of the wind conditions then prevailing, was too close to the ship's side to prevent further escape. As an oil transfer system, the shore facility's equipment was mismatched to the capability of the ship's equipment. This mismatch resulted in the oil spill and subsequent penalty which is the subject of this appeal.

VI.

The supplying and installation of the boom was not a usual task of Appellant's crew. Such task was that of the shore facility and required of it by the terms of its Army Corps of Engineers' permit. The installation of the boom by the shore facility was improper in that

there was a 100 foot gap and the boom was too close to the ship on the starboard side. The improper installation was readily apparent to one in Appellant's position. The improper installation of the boom allowed approximately 25 barrels from an estimated total 480 barrel oil spill to escape unimpeded into the waters beyond the confines of the boom. Ultimately, these 25 barrels of oil reached beaches extending one-half mile south and 18 miles north into Canada (See 2d page of Exhibit 12), including the recreational beaches of White Rock, Canada located approximately nine nautical miles north. Five working days were required to clean up the spill. There was no evidence of any fish kill.

VII.

In the determination of the $20,000 penalty, the Director of the Department of Ecology did not take into consideration the previous record of the vessel nor did he attempt any apportioning of the penalty according to the relative culpability between the joint wrongdoers for the cause of the oil spill. There were no written standards or regulations promulgated by the Director to determine the amount of the penalty. The standard used by the Director, as described by the testimony at the first hearing, was ambiguous. It was clear, however, that the Director's prime concern was the damage to the environment, determined by the extent and amount of the oil spill. Appellant unsuccessfully sought remission or mitigation of the maximum penalty assessed.

VIII.

On remand to properly assess a penalty, Respondent's enforcement officer considered the statutory standards in arriving at a recommendati

for a penalty of $5,000.00. This recommendation was then considered by the Deputy Director and the Director who mutually determined that the penalty should be reassessed at $10,000.00. They did not follow the enforcement officer's recommendation of $5,000.00 because he had not been aware of the "international situation, of the total publicity, and the coverage and public reaction that had resulted from the spill." Tr. 3-48. Neither the Deputy Director nor Director further considered the relative fault of ARCO and Appellant. Tr. 3-46, 58-60. However, such consideration was implicit in the recommendation of the enforcement officer since he had brought them "aboard on those facts." Tr. 3-13, 52. We find the $10,000.00 civil penalty amply supported by the evidence which was before the Director and before this Board.

IX.

Any Conclusion of Law hereinafter recited which should be deemed a Finding of Fact is hereby adopted as such.

From which comes the following

CONCLUSIONS OF LAW

I.

The Board has jurisdiction over the parties and the subject matter of this review.

II.

Federal law does not pre-empt assessment of a civil penalty by the State of Washington under RCW 90.48.350. 33 U.S.C.A. 1321(o) provides in part:

> (2) Nothing in this section shall be construed as pre-empting any state or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil

or hazardous substance into any waters within such state. (Emphasis added.)

This provision was construed as a valid waiver of pre-emption concerning any requirement or liability imposed by a state with respect to the discharge of oil or hazardous substances within the waters of the state. Askew v. American Waterways Operations, 411 U.S. 325, 329 (1973), reh. denied, 412 U.S. 933 (1973).

III.

Sea-to-shore pollution is within the reach of state police power, and is not silently taken away by federal admiralty and maritime jurisdiction over damages or injuries on navigable waters. Askew v. American Waterways Operation, supra at 343. This inherent police power of the state and the provision of 33 U.S.C.A. 1321(o)(2) allow the State of Washington to enact and enforce the provision of RCW 90.48.350. See Askew v. American Waterways Operation, supra at 343.

We hold therefore that RCW 90.48.350 does not unlawfully infringe upon the admiralty and maritime jurisdiction of federal courts.

IV.

Appellant's inability to remove the 14" to 8" reducer from the gate valve on cargo line #1 did not constitute negligence.

V.

Appellant failed to inquire whether the reducers and jack were sufficient to handle the forces from the Chiksan arm and the number of reducers. As an ordinary prudent man, Appellant is charged with discovering only what is readily apparent, and will not be held to knowledge of risks which are not known to him or readily apparent.

W. Prosser, Law of Torts, Section 32 (4th ed. 1971).

The facts of this case, as developed by the exhibits and testimony, impart no element of knowledge to Appellant nor do they create, by themselves, a separate duty to inquire about the probable forces upon its equipment. Lacking this duty to inquire about the forces involved, there is no negligence on the part of Appellant, absent any other action on its part.

VI.

Appellant participated in the preparation of the hookup arrangement which resulted in the oil spill.

Although there may be no duty to discover unknown risks, in and by itself, if Appellant proceeds in the face of known ignorance, such action may be negligent:

> "(Appellant may) be engaged in an activity, or stand in a relation to others, which imposes upon him an obligation to investigate and find out, so that he becomes liable not so much for being ignorant as for remaining ignorant; and this obligation may require him to know at least enough to conduct an intelligent inquiry as to what he does not know." W. Prosser, Law of Torts, p. 160 (4th ed. 1971) (footnotes omitted.)

The Appellant, having assumed the duty to make the connections, must do so in a reasonably prudent manner. Such action would include the duty to inquire about the shore facility equipment, including its operation, capabilities and possible dangers. Appellant had a duty to discover unknown risks by inquiry and inspection, especially in view of the gravity of harm to the environment possible from an improper connection.

The duty is, in this case, one owing to the State of Washington. RCW 90.48.350. This duty cannot be contracted away between private

parties. RCW 90.48.315(8); RCW 90.48.350. In the face of its known ignorance, Appellant chose to proceed with the hose connection. This act, without the necessary inquiry, constituted a breach of duty of care owed to the state. Such breach, while not the major cause of the oil spill, was nevertheless a material element and substantial factor in bringing it about. The discharge of oil from an improper hose connection was a foreseeable result from which Appellant cannot avoid liability.

We hold that Appellant's acts in making the hose connections was a negligent participation under the circumstances of this case. The imposition of a penalty reflects but part of a strong overall legislative policy to protect, maintain, and restore the waters of the State of Washington. See chapter 90.48 RCW. The Legislature has identified an especially harmful source of water pollution, i.e., oil, and imposed a particular liability upon it. Not only is a person strictly liable for any damage caused by oil in accordance with RCW 90.48.336, but in addition to any other penalty provided by law, he may incur an additional penalty under RCW 90.48.350. The vast concern with this potentially devastating product requires that all who deal with it in Washington become aware of Washington's concern with its fragile water resources upon which the State greatly depends. Strict enforcement of these laws is therefore necessary, not only in terms of compensation, but also as a deterrent. Therefore the imposition of such liability is reasonably necessary to prevent and control water pollution.

Moreover, it is not an unfair burden to carry for those dealing

with this potential pollutant. The persons handling such products are in the best position to take precautionary measures to avoid the harm. Failure to take precautionary action must also have its cost, and these costs are found in the legislative pronouncements concerning the penalty imposed upon the offender.

In the instant case, Appellant is found negligent in participating in a hose connection which failed, causing the oil spill. Although Appellant is not as culpable as the shore facility appears to be, it is liable either as a negligent participant or as one who aids by any act, in the violation as provided by RCW 90.48.350:

> Any person who intentionally or negligently discharges oil, or causes or permits the entry of the same, shall incur . . . a penalty . . . Every act of commission or omission which procures, aids or abets in the violation shall be considered a violation . . . .

The language of RCW 90.48.350 clearly imposes liability not only upon one who negligently causes an oil spill, but also upon one who aids in any such act. In the former instance, proximate cause is required. In the latter instance, only a showing that the acts or omissions substantially contributed to the resulting unlawful oil spill is necessary. Appellant violated both of the proscribed acts of RCW 90.48.350.

VII.

Appellant attacks RCW 90.48.350 as "inadequate and unconstitutionally vague and broad" because it failed to define "gravity of the violation" in connection with the determination of the amount of penalty assessed. In regard to the amount of penalty to be assessed RCW 90.48.350 provides in part:

> . . . said amount to be determined by the director . . . after taking into consideration the gravity of the violation, the previous record of the violator in complying, or failing to comply, with the provisions of chapter 90.48 RCW, and such other considerations as the director deems appropriate. (Emphasis added.)

Appellant's attack on the statute is presumably one claiming an unlawful delegation of discretion in setting a penalty rather than one claiming it void for vagueness or broadness in describing the proscribed act. We therefore consolidate Appellant's claims as attacking the statutory delegation giving the Director discretion to determine the penalty based upon (1) an alleged undefined standard of "gravity of the harm," and (2) an unbounded discretion to use "such other considerations as the director deems appropriate."

The general rule is that legislative power may not be delegated to an administrative agency without reasonable standards. Rody v. Hollis, 81 Wn.2d 88, 500 P.2d 97 (1972). Such standards must define in general terms what is to be done and the administrative body which is to do it. Id. Where, in addition, procedural safeguards exist to control arbitrary administrative action and guarantee due process of law, the delegation of legislative power is justified and constitutional. Barry & Barry, Inc. v. State, Department of Motor Vehicles, 81 Wn.2d 155, 500 P.2d 540 (1972); Rody v. Hollis, supra.

RCW 90.48.350 states what is to be done: impose a penalty of up to $20,000 for intentionally or negligently discharging oil, or aiding in such act. The person to impose the penalty is the Director. Any penalty imposed is reviewable by this Board. RCW 43.21B.110. The particular delegation meets the test promulgated by the Washington

Supreme Court in each and every element. The delegation is therefore not unlawful.

VIII.

Appellant attacks the application of the statute by the Director in determining the amount of penalty, specifically his failure to develop and apply adequate standards. It has been factually determined that the Director has made no written standards as a guide in assessing penalties. However, he has certain statutory guidelines to arrive at a proper penalty. The Director must consider:

1. The gravity of the violation;

2. The previous record of the violator, and

3. Other appropriate considerations. RCW 90.48.350.

The "gravity of the violation" means that the Director must take into consideration, inter alia, the awareness of the violator when making such violation, the relative fault between two or more violators in the same oil spill, and/or the precautions taken by the violator to avert such violation. These considerations were not made in assessing the $20,000 penalty.

The "previous record of the violator" requires that the Director take into consideration the violator's record covering the period from the enactment of RCW 90.48 until the time of the alleged violation. This was not done in assessing the $20,000 penalty.

The "other considerations as the director deems appropriate" include, but are not limited to, the environmental harm inflicted, the nature of the pollutant and the amount involved, the subsequent actions taken by the violator to remedy the damage, and the amount of

compensatory damages the violator has agreed to pay.

The statute requires that the Director exercise some discretion in determining the penalty under the foregoing standards. His determination must be reached after a consideration by him of every substantial factor bearing on the proper amount of penalty. The failure to consider any substantial factor may bear on the unreasonableness of the penalty assessed. The Director is not precluded from assessing the maximum penalty to each of several wrongdoers for causing one event in a proper case, however.

We hold that the statutory standards for assessing a penalty are adequate. [See also Yakima Clean Air v. Glascam Builders, 85 Wn.2d 255, 258 (1975) decided after our first proposed Order.]

IX.

We hold that the $10,000.00 civil penalty is proper and should be affirmed.

X.

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

Accordingly, it is the Board's

ORDER

That the $10,000.00 civil penalty is affirmed in all respects.

DONE at Lacey, Washington this 2d day of November, 1976.

POLLUTION CONTROL HEARINGS BOARD

Art Brown

ART BROWN, Chairman

W A Gissberg

W. A. GISSBERG, Member

Chris Smith

CHRIS SMITH, Member